

No. 78421-3

FAIRHURST, J. (concurring) – I concur with the lead opinion’s determination “that Washington State has a clear public policy of protecting domestic violence survivors and their children and holding domestic violence perpetrators accountable.” Lead opinion at 23. I write to express my concern about the burden placed on employers when this court recognizes new public policies and to explain, in part, my disagreement with the dissent and the concurrence/dissent.

I share the dissent’s concerns regarding the burden placed on employers when this court recognizes new public policies and, thus, alters the at-will employment relationship. “[T]he wrongful discharge exception should be applied cautiously in order to avoid allowing an exception to swallow the general rule that employment is terminable at will.” *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). However, in light of recent legislation explicitly providing “reasonable leave” for domestic violence victims in certain circumstances, Laws of 2008, chapter 286, section 3, any new burden imposed on employers in light of this decision is greatly reduced.

I disagree with the dissent’s limitation on which sources may be considered

when determining whether a clear public policy exists. In *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 933, 913 P.2d 377 (1996), we determined termination of “an at-will employee who violated a company rule in order to go to the assistance of a citizen who was in danger of serious physical injury or death” violated public policy. In analyzing the clarity element of the wrongful discharge in violation of public policy claim,¹ the court relied on exceptions to constitutional protections and statutory defenses to criminal charges. *Id.* at 944-45. Neither of these sources of public policy relate directly to the employment context. Thus, I believe the dissent takes too narrow of an approach by requiring some nexus between a public policy source and the employment relationship. *See* dissent at 11-15. A public policy source that explicitly mentions employment is more persuasive when analyzing the clarity element of a wrongful discharge claim, but such a nexus is not imperative. In the absence of such a nexus, evidence of the public policy

¹To prevail on a claim for wrongful discharge in violation of public policy, the following four elements must be established:

“(1) The plaintiffs must prove the existence of a clear [mandate of] public policy (the *clarity* element).

(2) The plaintiffs must prove that discouraging the conduct in which [the employee] engaged would jeopardize the public policy (the *jeopardy* element).

(3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the *causation* element).

(4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).”

Sedlacek, 145 Wn.2d at 387 (alterations in original) (quoting *Gardner*, 128 Wn.2d at 941).

must be overwhelming, as it was in *Gardner*. In this case, because of the overwhelming number of public policy sources and unwavering commitment by the legislative and executive branches to protect domestic violence victims, I believe a clear public policy exists.

Finally, the concurrence/dissent's analysis departs from the analysis set forth in *Gardner* by combining the clarity and jeopardy elements of a claim for wrongful discharge in violation of public policy. Concurrence/dissent at 5-8. In *Gardner*, this court differentiated between the clarity and jeopardy elements. 128 Wn.2d at 941 ("a more consistent analysis will be obtained by first asking if any public policy exists whatsoever, and then asking whether, on the facts of each particular case, the employee's discharge contravenes or jeopardizes that public policy"). The determination of whether a clear public policy exists is a question of law and does not involve a balancing of an employer's interests in operating a business, an employee's interest in continued employment, and the public's interest in effectuating broad public policies. *Id.* at 937, 942-45 (discussing possible sources of public policy without taking into account employers' interests). As rewritten by the lead opinion, the question presented in this case involves only the clarity element, which is properly analyzed and answered by the lead opinion.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Chief Justice Gerry L. Alexander
